

HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

JEFFREY SMYTH and BETTY SMYTH,
husband and wife, and the marital
community composed thereof,

Plaintiffs,

vs.

STATE FARM FIRE & CASUALTY CO.,
an Illinois corporation duly licensed in the
State of Washington,

Defendant.

NO. 2:05-cv-0838JLR

PLAINTIFFS' RESPONSE TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT OF
DISMISSAL

**NOTED ON MOTION
CALENDAR: October 7, 2005**

I. Introduction

Plaintiff Jeff Smyth,¹ a homeowner and insured, has sued his insurer defendant State Farm Fire & Casualty Co. ("State Farm") for declaratory and other relief arising from State Farm's failure to pay a claim for structural damage caused by hidden decay in Mr. Smyth's home on Mercer Island. State Farm removed the case to this court and has now moved to dismiss all of the claims on the basis of a one year contractual limitations period.

¹ Since this lawsuit was filed, the marriage of Jeff and Betty Smyth has been dissolved, and Mr. Smyth has purchased Mrs. Smyth's interest in their home. As such, Mr. Smyth is now the sole plaintiff in this action.

1 The motion should be denied for several reasons: (1) this action was filed within the
 2 contractual limitation period; (2) the filing of the lawsuit resulted in the negotiation of a tolling
 3 agreement which tolled the service time limit; (3) at best (for State Farm), the tolling agreement
 4 is ambiguous and should be construed against State Farm; and (4) material questions of fact exist
 5 with respect to (i) the date of loss or damage; and (ii) the type and extent of the insured's covered
 6 losses.
 7

8 **II. Pertinent Factual Background**

9
 10 Jeff and Betty Smyth ("Smyth") built their home on Mercer Island in 1991. Declaration of
 11 Jeff Smyth in Opposition to Motion to Dismiss at ¶ 2 (dated Oct. 3, 2005) ("Smyth Decl."). They
 12 have continuously insured the home with defendant State Farm from October 10, 1991 to the
 13 present, with no gaps in coverage. *Id.* Smyth consistently selected the broadest homeowners'
 14 coverage offered to him. *Id.* The cover page of the 1998-99 policy states: "*This is one of the*
 15 *broadest forms available today, and provides you with outstanding value for your insurance*
 16 *dollars.*" **Exh. J**, at POL000234, Declaration of Alvin Carlson (dated Sept. 10, 2005). Though they
 17 have seen their premiums rise steadily every year, all premiums (including for the current year)
 18 have been timely paid. Declaration of Jeff Smyth in Opposition to Motion to Dismiss ¶¶ 2-3 (dated
 19 Oct. 3, 2005) ("Smyth Decl.").
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 21
 22

23 In October 1998, State Farm attempted to limit Smyth's coverage by substantially
 24 eliminating coverage for hidden decay which causes "substantial structural impairment," leaving
 25 coverage only for actual structural "collapse," defined as "actually fallen down or fallen into
 26 pieces." Smyth was given no legally sufficient notice of this change in coverage
 27
 28

1 however.² As such, the new definition of “collapse” is inapplicable to Smyth’s policies up to the
 2 present date, as is discussed in detail below.³

3
 4 In the spring of 2003, Jeff Smyth confirmed through professional construction consultants
 5 (employed at his own cost), that hidden decay due to water infiltration had caused substantial
 6 structural impairment to his home, to the extent that one portion of the structure was visibly
 7 sagging. Smyth Decl. at ¶ 4. By the end of May 2003, Smyth’s contractors estimated that the
 8 damage was so extensive and dangerous that it could cost over \$318,000.00 to repair. *Id.* After
 9 hiring legal counsel, in August 2003 Smyth made a formal claim to State Farm. *Id.* at ¶¶ 4-5.

11 State Farm initiated an investigation of the claim, and in September 2003 its consultant
 12 generated a report observing that only a portion of the residence was in a state of “substantial
 13 structural impairment” by or before October 1998, coincidentally the date on which State Farm
 14 attempted to exclude coverage for that risk. **Exh. B**, at CLM00067-77, Declaration of James R.
 15 Perrault (dated July 26, 2005)(on file herein). The majority of the identified structural impairment,
 16 according to State Farm’s report, did not occur until *after* 1998. *Id.*

19 In a letter dated August 21, 2003, State Farm informed Smyth’s legal counsel that “we have
 20 identified several specific exclusions in your client’s State Farm Homeowners policy which may
 21 apply to preclude coverage for the loss.” **Exh. C**, at CLM000053(emphasis added), Carlson Decl.

24 ² Footnote 5 of defendant’s motion states incorrectly that Smyth was issued an “Amendatory Collapse
 25 Endorsement (FP7955)” in 1998. In fact, no such endorsement has ever been sent to Smyth. Smyth Decl. ¶ 13. The
 26 Declarations page of the 1998-1999 policy identifies that “The Loss Settlement Provisions of your policy have been
 changed.” Nothing is said about “collapse.” **Exh. J**, at POL000233, Carlson Decl.

27 ³ Smyth’s annual premium did not decrease or remain steady to reflect this coverage limitation: in fact,
 28 from policy year 1998 to policy year 1999, the annual premium increased nearly 50%, from \$897.00 to \$1,368.00,
 even though the Smyths had not previously made a claim. Smyth Decl. ¶ 2. Accordingly, the premium charged gave
 no clue of a coverage reduction.

1 One of them was a nonexistent "Amendatory Collapse Endorsement." *Id.* No other exclusions are
2 applicable to this claim.

3
4 When unsatisfactory progress was made in adjusting the claim, on February 23, 2004,
5 Smyth started this lawsuit against State Farm in King County Superior Court (seven months after
6 the claim date). Declaration of Simeon Osborn in Opposition to Motion for Summary Judgment
7 (dated Oct. 3, 2005)("Osborn Decl."). On February 26, State Farm expressly acknowledged that
8 it had been informed the complaint which Smyth had filed "in an abundance of caution." **Exh. F**,
9 at CLM000018, Carlson Decl.

10
11 Days later, on March 2, 2004, a tolling agreement was drafted and signed by State Farm.
12
13 See **Exh. G**, at CLM000033, Carlson Decl. State Farm's activity records acknowledged the
14 agreement as follows:

15 "We've entered into a tolling agreement with the insured to give us a chance to
16 complete the investigation and determine what we owe. Need to talk with Jim
17 P[errault] about the scope of repair, what's status of that."

18 **Exh. F**, at CLM000018, Carlson Decl. The tolling agreement extended the contractual limitation
19 period from one year "after the date of loss or damage" to 18 months. The tolling agreement did
20 not request or require that Smyth dismiss the complaint. It was not dismissed. State Farm
21 expressly refused to identify a date of loss or damage. Nothing prevented it from doing so.

22
23 The tolling agreement also provided that suit must be filed no later than one month from
24 the date "State Farm has made an offer to settle the above referenced claim." State Farm has to this
25 date never made an offer to settle this claim, although it sent an unsolicited partial payment to
26 Smyth without requesting a release. Smyth Decl. ¶ 8; Dep. of Jeffrey Smyth, at 96:4-97:18 (dated
27
28

1 Aug. 17, 2005), attached as **Exh. 1** to Osborn Decl. Indeed, Smyth's claim was not formally
 2 rejected by State Farm until this motion was filed.

3
 4 Because the tolling agreement cannot be construed as meaningless, Mercer Place
 5 Condominium Ass'n v. State Farm Fire & Casualty, 104 Wn. App. 597, 602-603 (2001)⁴, its
 6 ambiguous requirement that "suit must be filed" (suit had already been properly and timely filed)
 7 within 18 months was merely a paraphrase of the policy language;⁵ what the parties actually
 8 intended to do and what they did was toll the time limit for *service* of the complaint on the
 9 Insurance Commissioner. Osborn Decl. ¶ 3. Smyth's counsel relied on this reasonable assumption.
 10 *Id.* Had State Farm intended otherwise, it could have required Smyth to dismiss his complaint
 11 voluntarily. It did not do so. *Id.*

12
 13
 14 Investigations on the claim continued in 2004. Smyth's consultant Ralph Allen prepared
 15 a comprehensive report which was furnished to State Farm's Perrault. **Exh. E**, at CLM000019,
 16 Carlson Decl. On February 26, 2004, Perrault reported to State Farm that he was "preparing a
 17 second report that will include input from . . . Ralph Allen." **Exh. F**, at CLM000018, Carlson Decl.

18
 19 On or about May 24, 2004, State Farm sent an unsolicited payment for \$36,368.00 to
 20 counsel for Smyth, the amount representing its own estimated cost of repair of the limited portion
 21 of the damage (pre-1998) for which State Farm accepted responsibility. No release or other *quid*
 22 *pro quo* was requested of Smyth. **Exh. A**, Smyth Decl. The check identifies the "date of loss" as
 23

24
 25
 26 ⁴ "Overall, a policy should be given a practical and reasonable interpretation rather than a strained or
 forced construction that leads to an absurd conclusion, or that renders the policy nonsensical or ineffective."

27
 28 ⁵ The policy language actually states that the action "must be started" within one year. "Started" is not
 defined in the policy. The dictionary defines "start" as, "To begin an activity or movement; set out." The American
 Heritage Dictionary (2nd College ed. 1982). No specific definition may be ascribed to a term in an insurance policy
 unless the policy sets forth that definition. See numerous cases cited *infra*.

1 “October 9, 1998,” a date that has no other significance than it was one day before the effective
 2 date of the 1998-99 policy. *Id.*

3
 4 State Farm made out the check to Smyth payable as follows:

5 “Jeffrey A. Smyth & Betty A. Smyth & Washington Mutual Bank FA, its
 6 Successors and/or assigns & Pacific Northwest Bank, its Successors and/or Assigns
 & Associates Financial Services, its Successors and/or Assigns”

7 *Id.* (emphasis added). Smyth owed no money to an “Associates Financial Services.” It was
 8 impossible to negotiate the check because of this named co-payee. After much back-and-forth,
 9 State Farm was finally persuaded to reissue the check without “Associates Financial Services” –
 10 two months later on August 31, 2004. The entire summer construction season was lost as a result
 11 of this error. Repair work began on the Smyth home on or about mid-October 2004. Smyth Decl.
 12 ¶¶ 8-10.

13
 14
 15 No further progress on claim settlement was made with State Farm, or communication
 16 received, after the fall of 2004. Smyth Decl. at ¶ 11. Smyth learned long after the fact that State
 17 Farm had “closed” the claim file on June 10, 2004. *Id.* On April 18, 2005, well within the 18-
 18 month tolling period, the complaint in this matter was served on the Insurance Commissioner.
 19 State Farm now argues that it gave up nothing meaningful by signing the March 2, 2004, tolling
 20 agreement, in return for Smyth’s agreement not to serve the Insurance Commissioner: that it
 21 preserved all of its arguments regarding the contractual limitations period, plus gained a new
 22 argument (late service of process). This position is untenable.

23
 24
 25 State Farm does not appear to argue however, that the 18 months ran out at some specific
 26 time *before* April 18, 2005. In point of fact (1) the commencement date for the 18-month period
 27 has never been identified by State Farm, and State Farm refused to identify it in the March 2nd
 28

1 letter; and (2) no settlement offer was ever made by State Farm triggering the one month limitation
2 period.

3 **III. Legal Authority and Argument**

4 **A. Summary Judgment.**

5 Summary judgment is appropriate only when the moving party demonstrates that “there is
6 no genuine issue as to any material fact and that the moving party is entitled to a judgment as a
7 matter of law.” Fed. R. Civ. P. Rule 56(c); Celotex Corp v. Catrett, 477 U.S. 317, 322-23 (1986).
8

9 A disputed fact is material to the outcome of the suit if a finding of fact is necessary and relevant
10 to the proceeding. *Id.*; General Mills, Inc. v. Hunt-Wesson, Inc., 103 F.3d 978, 980 (Fed. Cir.
11 1997). As part of this evaluation, the court must view the evidence in the light most favorable to
12 the nonmoving party—here, the plaintiffs. Imax Corp. v. Cinema Techs., Inc., 152 F.3d 1161,
13 1164 (9th Cir. 1998).
14

15 **B. Identification of Issues.**

16 The issues which this motion presents are these:

- 17 1. Was the contractual suit limitation in the Smyth insurance policies modified in any
18 meaningful way by the March 2, 2004, tolling agreement, in return for Smyth’s agreement to
19 refrain from serving the Insurance Commissioner?
20
- 21 2. How was the contractual limitation period modified?
22
- 23 3. When the tolling agreement was signed, did the parties reach any understanding of
24 what the “date of loss or damage” was, from which date the new limitation period was to run?
25
- 26 4. Is State Farm equitably estopped from advocating a certain “date of loss or damage”
27 by virtue of its refusal to take a position on it in the tolling agreement?
28

1 5. If there was no understanding as to the date of loss or damage, to what date does the
2 18-month limitation period relate?

3
4 6. Should ambiguities in the tolling agreement, which State Farm drafted, be construed
5 against it?

6 7. Is the only meaningful interpretation of the tolling agreement that the 90 day service
7 requirement be suspended?

8
9 8. Should this motion for summary judgment be denied because of the existence of
10 several genuine issues of material fact?

11 We submit that the tolling agreement was motivated solely to avoid service on the Insurance
12 Commissioner of the timely filed complaint in this matter. Because a complaint had already been
13 filed, there was only one thing left to “toll”: the time limit for service of the summons and
14 complaint. Statutory filing limitations periods can be and frequently are suspended by agreement;
15 there is no reason why statutory service limitations cannot be tolled in the same way.
16

17
18 In the alternative, Smyth contends that State Farm should be equitably estopped from
19 benefitting in any way from ambiguities in the tolling agreement which it drafted. Any ambiguities
20 as to (1) the date of loss or damage; or (2) what the tolling agreement actually “tolled” should be
21 construed against State Farm. Moreover, if State Farm believed that the one-year contractual
22 limitation had expired *before* the tolling agreement was signed (*e.g.*, an October 10, 1998 “date of
23 loss”), then State Farm’s inducement of Smyth’s reliance on that agreement should be sufficient
24 grounds to impose an estoppel. If State Farm is estopped, then the six year statute of limitations
25 for written contract disputes applies here. RCW 4.16.040(1).
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1 **C. Contractual Limitations Periods.**

2 Smyth agrees with the proposition that contractual limitations on lawsuits may be placed
3
4 in insurance policies. But if (as here) the one-year contractual limitation period begins to run from
5 the “date of loss or damage,” then without knowing that date, or if that date is intentionally
6 obscured, how is one to determine when the limitation period begins to run? State Farm’s motion
7 does not attempt to answer this question.
8

9 State Farm has in fact refused to identify a date of loss or damage. As Mr. Smyth observed
10 in his deposition:

11 “Q [MR. WITTERS] Now, do you know whether or not you brought suit
12 against State Farm within the reading of the law, within 18 months of the loss or
13 damage, or from within one month of the offer to settle, whichever was sooner?

14 A [MR. SMYTH] Yes, I believe I did. . . . Well, first of all, there’s never
15 been an offer of settlement made in this case. . . . Second of all, the insurance
16 company has, as of this date, never taken a position with respect to when the date
17 of loss or damage was. If you will look at this [March 2nd] letter, they specifically
18 state that no position is taken for this time as to the date of loss or damage, and no
19 position has ever been taken, to my knowledge. So it’s a little bit difficult to assess
when this 12 - 18-month period begins to run, given the fact that the person who’s
protected by this particular clause refuses to commit as to when the date of loss is.
. . .”

20 Smyth Dep., at 96:22-97:17, attached as **Exh. 1** to Osborn Decl.

21
22 State Farm now takes the position that the 18-month period ran from the date that the
23 Smyths “discovered the severe structural damage to the residence which is the subject of the claim
24 against State Farm.” Motion, at 12, n.7. This is known as the “manifestation trigger theory.”
25 Washington has rejected this theory in cases of hidden decay, as discussed in detail below. In not
26 one of the “coverage” letters sent by State Farm to Smyth did it state that suit must be filed 18
27
28

1 months from the "date of discovery." (Copies of the coverage letters are attached **Exh. C**, at
 2 CLM000053 - CLM000058; **Exh. G**, at CLM000033; **Exh. I**, at CLM000119; Carlson Decl.
 3

4 **D. Date of Loss or Damage.**

5 State Farm's motion glosses over the issue of identifying the date of loss or damage.
 6 Instead, State Farm claims that all but a small part of Smyth's hidden decay losses occurred some
 7 time *after* October 1998, relying upon its unilateral coverage change in 1998-99.
 8

9 State Farm states as fact in footnote 5 on page 6 of its brief that in October of 1998 it issued
 10 an "Amendatory Collapse Endorsement" to Smyth changing the policy definition of collapse from
 11 "substantial structural impairment" to "entire collapse of a building," meaning "actually fallen
 12 down or fallen into pieces." It argues that despite the seriousness and extent of the hidden decay
 13 in the Smyth residence (itself a factual question), because nothing has yet "fallen down" there is
 14 no coverage post-1998. But as we have shown, there was no Amendatory Collapse Endorsement
 15 issued to any Smyth policy. And the amendatory endorsement which is attached to Smyth's 1999
 16 policy (effective Oct. 10, 1998) makes no reference at all to a new, restricted definition of
 17 "collapse." **Exh. J**, at POL000261-264, Carlson Decl.
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20 The decision in Ellis Court Apartments Ltd. Partnership v. State Farm, 117 Wn. App. 807
 21 (2003), which presents facts startlingly similar to the facts in the present case, unambiguously
 22 rejected State Farm's reliance on the "manifestation trigger theory." The insured, a condominium
 23 association, sustained substantial structural impairment losses as a result of hidden decay due to
 24 water damage. It had carried insurance with State Farm continuously from July 14, 1993 through
 25 September 1, 1999. *Id.* at 809. As here, the policies in question covered collapse caused by hidden
 26 decay. In July 1998, State Farm restricted the definition of collapse by issuing Ellis Court an
 27
 28

1 Amendatory Collapse Endorsement thereby eliminating coverage unless the structure first falls to
 2 the ground. *Id.* Because State Farm could not prove it served an Amendatory Collapse
 3 Endorsement on Ellis Court (as is the case here), it stipulated that the restrictive definition of
 4 collapse would not apply. *Id.*

6 State Farm argued in *Ellis Court* that the trigger date of loss or damage for purposes of
 7 policy coverage should be determined by using the manifestation trigger theory, *i.e.*, what is “the
 8 date on which you were aware of damage from decay such that a claim was or should have been
 9 submitted?” *Id.* at 813. In *Ellis Court*, that date fell after the 1999 policy ended. State Farm
 10 rejected the coverage claim on this basis. In the ensuing declaratory judgment action, Ellis Court
 11 argued that the triggering event should have been determined by using the “injury-in-fact” test, *i.e.*,
 12 that the date of loss should be “the point in time when decay or rot first causes substantial structural
 13 impairment.” *Id.* at 813. The trial court agreed and granted Ellis Court’s motion for summary
 14 judgment. The court of appeals affirmed:

18 “The policy here contains no language purporting to condition, limit, or connect the
 19 commencement of property loss or damage to when that damage was discovered .
 20 . . . The record contains no extrinsic evidence that the policy should be construed
 21 to mean that damage commences when it is discovered. We therefore interpret the
 provision in favor of the insured, and find that ‘commence’ refers to the time the
 damage first began, not to when it was discovered.”

22 117 Wn. App. at 814.

23 Ralph Allen describes in his reports and deposition several aspects of the Smyth home
 24 which have reached a state of substantial structural impairment due to hidden decay. Allen
 25 deposition, 45:10-18 and **Exh. 8**; 50:10-51:14 and **Exh. 9**, and *see, e.g.*, Deposition of Ralph Allen,
 26 at 64:22-65:22; 69:14-21; 70:8-71:20 (dated Sept.15, 2005), all attached as **Exhibit 2** to Osborn
 27
 28

1 Decl. Smyth hereby moves to publish this deposition *in toto*. State Farm arbitrarily limited its
 2 coverage of these losses to those which it says reached a state of structural impairment *before*
 3 October 10, 1998, when the policy language supposedly changed. State Farm has refused to pay
 4 the costs for any other substantial impairment, and it has likewise refused to pay the reasonable cost
 5 of performing and repairing necessary and significant destructive testing and investigation which
 6 was performed to identify the losses. Smyth Dep., at 107:8-108:16, attached as **Exh. 1** to Osborn
 7 Decl. It has breached its contract by making these coverage determinations and by failing to make
 8 payment to Smyth.
 9

11 **E. Collapse**

13 **1. Notice of Change in Policy Coverage**

14 An Amendatory Collapse Endorsement was never provided to Mr. Smyth. The Smyth's
 15 policies from 1996 to the present are attached to the Declaration of Carlson on file herein as
 16 **Exhibit J**, at POL000173 to POL000445. There is no Amendatory Collapse Endorsement. Yet,
 17 State Farm changed the definition of "collapse" substantially in October of 1998. Smyth had no
 18 advance notice of this change. Smyth Decl. ¶ 13.

20 The seminal decision in McGreevy v. Oregon Mutual Ins. Co., 74 Wn. App. 858 (1994),
 21 controls:
 22

23 "Following the issuance of the policy here, Oregon Mutual attempted to unilaterally
 24 amend it to take advantage of changes in the law which authorized the prohibition
 25 of stacking. But this required a change in the contract of insurance which, in turn,
 26 required a meeting of the minds and agreement. Notice and agreement must be
 27 obtained before amendments or modifications to insurance policies can be made by
 28 the insurer. Orsi v. Aetna Ins. Co., 41 Wn. App. 233, 240, 703 P.2d 1053
 (1985)(before a policy can be modified, there must be an actual agreement or
 understanding that the policy will be or is modified)(relying on Grand Lodge of
 Scandinavian Fraternity of Am., Dist. 7 v. United States Fid. & Guar. Co., 2 Wn.2d

561, 572, 98 P.2d 971 (1940)(in order to modify the bond, there must be an agreement to modify, supported by consideration)). Oregon Mutual's position would extend the rule in Webster to include endorsements or amendments to an insurance contract. Such an extension, however, would eliminate the need to notify insureds of amendments and would allow an insurer to deny coverage or benefits without the knowledge or consent of the insured. . . . We disagree that the average policyholder would be put on notice of a substantial change -- the loss of stacking -- by the notation at the bottom of a declaration sheet -- 'OMG-24'. Without receipt of the actual endorsement, which the jury concluded she did not receive, the notation would not have been meaningful."

Id. at 867-68 (emphasis added).

For 15 straight years, Smyth insured his home with State Farm. For 8 years, the terms remained essentially the same. Then, suddenly, in October 1998 the definition of coverage changed dramatically. Smyth, not surprisingly, remained wholly unaware of the change until the present dispute arose. Smyth Decl. ¶ 13.

It does not impose an impermissible burden on the insurer to require it to prove that it properly notified its insurer of a change in coverage. The court in *McGreevy* observed:

"Oregon Mutual made a business decision not to maintain records of specific mailings of significant changes in policy coverage. It could have had each insured sign a copy of the amendment and return it to an insurance agent verifying that they received and understood the changes; the notice could have been mailed certified or registered -- any of which would have provided evidence of notice. . . . [I]ncreased costs would not excuse an obligation to notify an insured of significant changes in coverage. Presumably, the cost to keep such records exceeds the cost of providing for coverage it hoped to avoid when an insured is not notified of a change."

McGreevy, 74 Wn. App. at 869.

Ironically, the insurer also argued that the increase in premiums should have put the insureds on notice that a change had been made to the existing policy. The court will recall that Smyth's premiums increased 50% between 1998 and 1999. The court said, "An increase in

1 premiums is not adequate notice; premiums increase for any number of reasons, including the
 2 purchase of new vehicles, increases in coverage, or increases in the insurer's cost of business." *Id.*
 3 One is left to wonder, moreover, how an *increase* in premiums would signal a significant
 4 limitation, as opposed to expansion, of coverage.
 5

6 RCW 48.18.2901 states in part as follows:

7
 8 "(2) Any insurer failing to include in the [renewal] notice required by subsection
 9 (1)(b) of this section the amount of any increased premium resulting from a change
 10 of rates and an explanation of any change in the contract provisions shall renew the
 11 policy if so required by that subsection according to the rates and contract
 12 provisions applicable to the expiring policy." [Emphasis added].

13 A twenty day notice of such changes is required. RCW 48.18.2901(1)(b) & (2). No such notice
 14 was sent to Smyth. *Ever*. As such, the 1999 - 2005 policies have been renewed "according to the
 15 . . . contract provisions applicable to the expiring policy," *i.e.*, the 1997-1998 policy. RCW
 16 48.18.2901(2). This requirement is reflected in the Washington Administrative Code as well:

17 "It is unfair practice to utilize a twenty-day notice to . . . change the terms of a
 18 policy to the adverse interest of the insured thereunder, except on a one time basis
 19 in connection with the renewal of a policy as permitted by RCW 48.18.2901(2), or
 20 to utilize such notice if it . . . does not provide sufficient information to enable the
 21 insured to understand the basic nature of any change in terms"

22 WAC 284-30-590(1). In determining which collapse definition to use, therefore, the 1999 changed
 23 definition limiting coverage to actual falling down or falling apart must be disregarded entirely, for
 24 all of Smyth's policies to date, and the 1998 policy language should be deemed applicable to this
 25 lawsuit.

26 2. Defining "Collapse"

27 "Collapse" is a liberally construed concept in insurance circles. In Mercer Place
 28 Condominium Ass'n v. State Farm Fire & Cas., 104 Wn. App. 597 (2001), State Farm conceded

1 that the word “collapse” as used in Mercer Place’s policy means “substantial impairment of
 2 structural integrity,” so the court found no need to construe the term. The court did observe that
 3 a “growing number of jurisdictions have assigned the more liberal standard, ‘substantial
 4 impairment of structural integrity,’ to the use of ‘collapse’ in insurance policies, as opposed to the
 5 minority view, which requires that the structure actually fall down.” *Id.* at 629. The court also
 6 noted that “Judge Barbara Rothstein predicted that the Washington Supreme Court, if called upon
 7 to interpret a collapse provision in an insurance policy, would adopt the majority ‘substantial
 8 impairment’ standard.” *Id.* (citing Allstate Ins. Co. v. Forest Lynn Homeowners Ass’n, 892 F.
 9 Supp. 1310, 1314 (W.D. Wash. 1995)(opinion withdrawn by 914 F. Supp. 408 (W.D. Wash.
 10 1996))).

11 In Assurance Co. v. Wall & Assocs., 379 F.3d 557 (9th Cir. 2004), the court of appeals
 12 reversed a summary judgment entered in favor of an insurer where the court defined “collapse”
 13 narrowly to require a sudden collapse. The court’s reasoning tracked *Mercer* and *Allstate* decisions
 14 closely, concluding that substantial loss of structural integrity, rather than actual falling down, is
 15 the appropriate definition of collapse:

16 “[Such interpretation avoids] the unreasonable result of requiring an insured
 17 seeking the benefits of its insurance coverage to neglect repairs and allow a building
 18 to fall, a course of action which could not possibly comport with the expectation
 19 and intent of the insured, or advance the best interests of the insurer, the public or
 20 even the insurer”

21 *Id.* at 562.

22 In Buczek v. Continental Cas. Ins. Co., 378 F.3d 284, 290 (3d Cir. 2004), the court applied
 23 New Jersey law to an insurance coverage dispute involving pilings damaged by hidden decay. The
 24 court noted that collapse coverage in New Jersey includes a collapse which has not yet occurred

1 but is "imminent." This was based on the New Jersey opinion in Fantis Foods, Inc. v. North River
 2 Ins. Co., 753 A.2d 176, 183 (N.J. Super. Ct. App. Div. 2000), wherein the court decided that the
 3 definition of collapse "must be taken to cover any serious impairment of structural integrity that
 4 connotes imminent collapse threatening the preservation of the building as a structure or the health
 5 and safety of occupants and passers-by."

7 In Beach v. Middlesex Mutual Assurance Co., 205 Conn. 246, 532 A.2d 1297 (Conn.
 8 1987), the issue was whether there was a latent ambiguity in the term "collapse." The court found
 9 that there was and defined "collapse" as follows:
 10

11 "Although 'collapse' encompasses a catastrophic breakdown, as the
 12 defendant argues, it also includes a breakdown or loss of structural
 13 strength, as the plaintiffs maintain. If the defendant wished to rely
 14 on a single facial meaning of the term 'collapse' as used in its
 15 policy, it had the opportunity expressly to define the term to provide
 16 for the limited usage it now claims to have intended."

17 * * * *

18 The result that we reach finds support in the reasoning of other
 19 courts. Although the judicial decisions elsewhere are divided, the
 20 more persuasive authorities hold that the term 'collapse' is
 21 sufficiently ambiguous to include coverage for any substantial
 22 impairment of the structural integrity of a building." The cases that
 23 hold to the contrary, which hold that 'collapse' unmistakably
 24 connotes a sudden falling in, loss of shape, or flattening into a mass
 25 of rubble, have come to be in the distinct minority.

26 *Id.* at 251-53 (emphasis added)(citations omitted). The court affirmed the trial court's decision
 27 premised on a cracked foundation wall, separated wooden support beams, and a cracked concrete
 28 patio floor. The plaintiffs lived in their house at all times including during the period that the
 structural repairs were completed. There was testimony that the house would have caved in had
 the plaintiffs not acted to repair the damage. *Id.* at 248-49.

1 In Nationwide Mutual Fire Ins. Co. v. Tomlin, 352 S.E.2d 612 (Ga. App. 1986), cracks in
 2 exterior brick walls which were being pulled away from the house were caused by a decaying tree
 3 trunk under the foundation. The insurance company refused to provide coverage for “collapse.”
 4 The policy at issue provided insurance for “collapse of a building or any part thereof.” *Id.* at 613-
 5 14. The court looked at the policy as a whole to determine if any ambiguity existed as to the term
 6 “collapse” and found that it was not clearly defined in the policy.
 7

8 The court discussed the different court views of the definition of “collapse” and adopted
 9 the definition expressed in Gov’t Employees Ins. Co. v. DeJames, 261 A.2d 747, 751 (Md. 1970):
 10

11 “A contrary view is expressed in Gov’t. Employees Ins. Co. v. DeJames, *supra* at
 12 751, which defines ‘collapse’ as ‘any serious impairment of structural integrity.’
 13 Because that interpretation more realistically reflects the purposes of the policy, we
 14 adopt it as our own. In applying this test to the facts of this case, we conclude, as
 15 did the trial court, that the condition is covered under the policy. We further refine
 16 the definition in Gov’t. Employees Ins. Co. and announce that in this state, when
 17 ‘collapse’ is not otherwise defined in an insurance policy, it shall be deemed as
 18 having occurred when there is a reasonably detectable serious impairment of
 19 structural integrity.”

20 Tomlin, 352 S.E.2d at 615 (emphasis added). The court went on to reject the insurance company’s
 21 insistence on a ‘plain meaning’ approach:
 22

23 “We are unpersuaded by appellant’s position, since each of the cases cited is
 24 distinguishable: in Higgins v. Conn. Fire Ins. Co., *supra*, there was no worsening
 25 of the condition as here. Olmstead v. Lumberman’s Mut. Ins. Co., *supra*; and
 26 Stewart v. Preferred Fire Ins. Co., 206 Kan. 247, 477 P.2d 966 (1970), were ‘named
 27 peril’ policies as opposed to ‘all risk’ policies. LaSalle Nat. Bank v. American Ins.
 28 Co., 14 Ill. App. 3d 1027, 303 N.E.2d 770 (1973), dealt with an inherent rather than
 extraneous cause of collapse. New Zealand Ins. Co. v. Lenoff, 315 F.2d 95 (9th
 Cir. 1963), dealt exclusively with the meaning of ‘settling’ rather than ‘collapse.’
Graffeo v. U.S. Fidelity & Co., *supra*, followed the prior decisions of the New York
 court, which required an element of suddenness. There is no such requirement in
 Georgia.

We are more inclined to follow the lead of Great Eastern Cas. Co. v. Blackwelder, 21 Ga. App. 586, 94 S.E. 843 (1917), one of the earliest decisions in this state. In Great Eastern, in interpreting the meaning of the word 'building,' the court also mentioned 'collapsed.' In finding the insurance company liable, it held that in a contract of adhesion where the language is susceptible to two or more meanings, the meaning more favorable to the insured is to be preferred if it can be done without doing violence to the contract. Great Eastern, at 592, states: 'It is not necessary for the plaintiff's recovery to show that the entire building collapsed.'

Id. Finally, the court noted that to hold otherwise would be economically wasteful, a theme or basis for the definition present in many other opinions as well. *Id.* at 416.

In Indiana Ins. Co. v. Liaskos, 297 Ill. App.3d 569, 697 N.E.2d 398 (1998), the court adopted an even broader definition for the term "collapse" after reviewing a multitude of court opinions analyzing the term "collapse."

"It is clear from these cases that under the majority view the term 'collapse' does not require complete destruction or falling in of the building or a part thereof nor would it require that the loss result from a sudden catastrophic occurrence. Beach, 205 Conn. 246, 532 A.2d 1297. A collapse will be deemed to have occurred where a falling is imminent (e.g., Whispering Creek Condominium Owner Ass'n, 774 P.2d 176) or where there is any substantial impairment of the structural integrity of the building (e.g., Mitchell, 503 So.2d 870; Beach, 205 Conn. 246, 532 A.2d 1297). Thornewell, 33 Wis.2d 344, 147 N.E.2d 317.

At this juncture, we note our preference for the majority view rather than the narrow interpretation given by the courts in La Salle National Bank and Rubenstein. We are impressed with the fact that substantial impairment to the structural integrity of a building comes within the dictionary definition of the term 'collapse' and should be sufficient to trigger coverage under the term 'collapse.' To require a complete falling in of a structure gives undue ascendancy to semantic casuistry. Moreover, given the fact that the dictionary definition of 'collapse' makes both parties' interpretations of the term 'collapse' reasonable, we as the court in Beach, find it necessary to adopt the broader definition under the rule of construction that ambiguous policy terms are to be construed against the drafter and in favor of the insured."

Id. at 578.

1 Although the court ultimately affirmed the lower court's decision that the Liaskos did not
 2 have coverage, the court's reasoning is instructive here. The damage experienced at the Liasko
 3 home appeared to be caused by increased water pressure from a city sewer system that over-
 4 stressed the plumbing, causing the slab in the basement to crack and be pushed up along with
 5 cracks in a foundation wall, doors and passageways on the first floor and in the exterior masonry
 6 adjacent to the front door. Neither testifying expert during the bench trial concluded that the
 7 structural foundation was unsound or that there was a breakdown or loss of structural strength in
 8 the Liaskos's home.
 9

11 "The evidence did not show that the basement foundation wall had moved and
 12 separated from the rest of the foundation, that it was no longer supporting
 13 Liaskos's home or that its movement caused Liaskos's home to be uninhabitable.
 14 See Thornwell, 33 Wis.2d 344, 147 N.E.2d 317 (applying majority view but finding
 15 that bulge in basement wall did not materially impair basic structure or substantial
 16 integrity; wall could perform its structural function). This is to be contrasted with
 17 the facts in Campbell, 682 A.2d 933, wherein the basement foundation wall
 18 crumbled causing the house to shift, the floors to be come unlevel and the house to
 19 become uninhabitable; in Whispering Creek Condominium Owner Ass'n, 744 P.2d
 20 176, wherein the ceiling joists had deteriorated and the roof was in immediate
 21 danger of collapse; in Beach, 205 Conn. 246, 532 A.2d 1297, where the basement
 22 foundation was no longer supporting the house and where the house eventually
 23 would have fallen into the basement; and in Mitchell, 503 So.2d 870, where the
 24 staircase had separated from the primary walls, the main body of support was
 25 damaged and parts of the house could not support the weight of a person."

26 *Id.* at 579. *Liaskos'* facts are easily distinguishable from the *Smyth's*. Here, Ralph Allen has
 27 testified that in his view the identified damage was in fact defined by its inability to carry a
 28 requisite load or to support a structure. Allen deposition at 65:15-22; 69:14-70:2; 70:8-71:20,
 attached as **Exhibit 2** to the Osborn Decl.

In Guyther v. Nationwide Mutual Fire Ins. Co., 428 S.E.2d 238 (N.C. App. 1993), a house
 after a heavy snowfall, experienced a noticeable "dip" in part of the roof while the second floor of

1 the house dropped by two to three inches. *Id.* at 240. The insurance policy at issue included
 2 language nearly identical to the Smyth's 1998 policy:

3
 4 "We insure for direct physical loss to covered property involving collapse of a
 5 building or any part of a building caused only by one or more of the following:

6 * * *

7 b. hidden decay

8 * * *

9 Collapse does not include settling, cracking, shrinking, bulging or expansion."

10
 11 *Id.* The insurance company argued that the policy required total destruction of the structure. The
 12 court did not adopt that definition finding the term ambiguous:

13 "Among the accepted definitions of 'collapse' is 'to break down completely; fall
 14 apart in confused disorganization; crumble into insignificance or nothingness."
 15 *Webster's Third New International Dictionary* 443 (1966). Another accepted
 16 definition is "to suddenly lose force . . . effectiveness, or worth." *Id.* Although both
 17 these definitions encompass the total destruction of a structure, the second
 18 definition can include less than total destruction. A building has lost its
 19 'effectiveness' or 'worth' when its basic structure or integrity is materially
impaired. Accordingly, in giving the ambiguous term the reasonable definition
 20 which favors the Guythers, the term 'collapse' includes the sudden material
impairment of the basic structure or integrity of a building which remains standing.

21 . . .

22 Nationwide contends that the above definition of the term 'collapse' is in direct
 23 conflict with the provision of the policy which provides that collapse does not
 24 include 'settling, cracking, shrinking, bulging or expansion.' We do not agree. The
 25 policy purports to provide coverage for collapse, and may be reasonably read to
 26 exclude coverage for 'settling, cracking, shrinking, bulging or expansion' only
when they do not suddenly and materially impair the structure or integrity of the
building."

27 *Id.* at 241-42 (emphasis added).

28 The court then found that evidence of impairment was properly submitted to the jury:

1 “The record reflects the following evidence on the condition of the house: part of
 2 the house ‘was dropped, considerable’ and one of the doors of the house would not
 3 open; the floor had fallen away from the baseboards in some sections of the house
 4 and the floor was so uneven that ‘you actually had to walk downhill in the hall;’ the
 5 ceiling in the downstairs area of the house was bowed and ‘the exterior portion of
 6 the [roof] had started to push down and out instead of being just a straight flat roof;’
 7 the changes in the house on 1 April 1998, occurred suddenly; the kitchen cabinets
 8 had pulled away from the wall and the upstairs floor had dropped to the extent that
 9 ‘it’s just like a step-off from the balcony to the hall;”

10 *Id.* at 242. Similarly, here the evidence shows that the Smyth home suffers from most of the same
 11 maladies as described in this case, all of which fell under the rubric of “collapse.”

12 Campbell v. Norfolk & Dedham Mutual, 682 A.2d 933 (R.I. 1996), involved damage to a
 13 house including some crumbling of the foundation, unlevel floors, which eventually rendered the
 14 home uninhabitable. The insurance company refused coverage because the policy provided the
 15 same language as in the Smyth’s policy:

16 “We insure for direct physical loss to covered property involving collapse of a
 17 building or any part of a building caused only by one or more of the following:

18 * * *

19 b. hidden decay

20 * * *

21 Collapse does not include settling, cracking, shrinking, bulging or expansion.”

22 *Id.* at 935. The appellate court reversed a summary judgment in favor of the insurer:

23 “Here, plaintiffs do not contend that the basement wall settled, cracked, or bulged,
 24 or expanded, but that a large part of it crumbled into a pile of rubble.
 25 Consequently, the motion justice erred when she concluded that ‘[s]ince the damage
 26 to plaintiffs’ home consists of cracked walls and unlevelled floors, the requisite
 27 ‘collapse’ of the building has not occurred.”

1 *Id.* As part of its evaluation of the motion justice's decision, the reviewing court discussed the
2 definition of 'collapse:'

3
4 "The issue, then, becomes whether it is reasonable for the purchaser of an insurance
5 contract to believe that the collapse of a nineteen-foot section of a thirty-two-foot
6 basement wall that eventually renders this home inhabitable constitutes a 'collapse
7 of building.' This court has never defined these terms, and both parties sharply
8 dispute their meaning.

9
10 In construing insurance clauses similar to the one here, many courts have found that
11 use of the word 'collapse' in an insurance policy does not require the total
12 destruction of a building because to require a party to await complete destruction
13 before losses will be covered frustrates an insured's understanding of the insurance
14 agreement and subverts his or her duty to mitigate damages to avoid economic
15 waste."

16 *Id.* at 936 (emphasis added)(citations omitted). The court thus found the term "collapse" to be
17 ambiguous and remanded the case to the superior court for further proceedings.

18 Part of the substantially failed structure of the Smyth residence is a rotting untreated beam
19 running along the north side of the home. Allen deposition at **Exh. 8**, p.3, attached as **Exh. 2** to
20 Osborn Decl. According to Mr. Allen's deposition, this beam does not meet code requirements for
21 load bearing strength, and it is on its way to complete failure. *Id.* Smyth cannot be forced to await
22 the utter destruction of his home by abiding the time when the beam reaches a state of complete
23 dilapidation. Yet State Farm has taken the untenable position that he must do so. It is a guarantee,
24 moreover, that State Farm will either cancel Mr. Smyth's coverage or will send the necessary
25 amendatory collapse endorsement now, thereby eliminating this protection *in futuro*. This is unfair
26 and violative of the insurance agreement.

1 **E. Increase in Chance of Loss.**

2 State Farm accuses Smyth of failing to maintain the residence enough, thus increasing the
3 risk of substantial structural impairment (“collapse”). This, of course, is a factual question at
4 foundation, and Mr. Smyth’s testimony creates a genuine and material factual issue. He has
5 testified that apparently some or all of the sealant failed early in the 1990s, but that he did not
6 notice any change. Smyth Decl. at ¶ 13. He believes that he would have noticed any significant
7 change. *Id.* Only recently, when he began to investigate the decay, was it brought to his attention
8 that gaps in the caulking were a potential cause of water intrusion. *Id.* Nor did or could he see
9 gaps in the flashing. *Id.* According to Smyth, he does not possess the requisite skill or experience
10 in construction technology to judge whether flashing is done right or wrong. Smyth Dep., at 36:4-
11 39:6, **Exh. 1** to Osborn Decl.

12 The *Ellis Court* decision also addresses the increased chance of loss argument, and affirmed
13 the dismissal on summary judgment of this defense:

14 “The ‘knowledge or control’ provision of the policy at issue states: ‘We will not
15 pay for loss while the chance of loss *is increased* by any means within your
16 knowledge or control.’ State Farm argues that factual issues preclude summary
17 judgment as to this defense. We disagree. State Farm argues that ‘where, as here,
18 a building owner has allowed water intrusion into the premises to continue until a
19 collapse state is reached, there can be no question that State Farm’s chance of loss
20 has been substantially increased.’ State Farm maintains that testimony from
21 inspectors and carpenters familiar with the building’s problems provide evidence
22 that Ellis Court increased its chance of loss. The testimony by inspectors and
23 carpenters is evidence that water leakage had occurred, but it is not evidence that
24 Ellis Court increased the chance of loss. The essence of State Farm’s argument is
25 that because Ellis Court did not do more, and sooner, to remedy the water leakage
26 problem, it failed to decrease its loss. But failure to decrease a loss is not the same
27 as increasing a loss’

28 Ellis Court Apartments L.P. v. State Farm, 117 Wn. App. 807, 817 (2003) (emphasis added).

1 State Farm argues, in essence, that Smyth should have done more to prevent the intrusion
 2 of water into his home over the years. But as with *Ellis Court*, this proves at most that Smyth
 3 failed to *decrease* his loss, which is not the same as “increasing” a loss. In any case, it is State
 4 Farm’s burden to prove that Smyth actually increased the chance of loss and thus violated his
 5 policy. It is not Smyth’s burden on summary judgment or at trial to prove the opposite.
 6

7
 8 **G. Bad Faith.**

9 State Farm has also asked that the Washington Consumer Protection Act claim be
 10 dismissed. It argues that State Farm has not violated any duty or acted improperly with respect to
 11 this claim. Filed herewith is the Declaration of Richard B. Kilpatrick (dated October 3, 2005),
 12 attaching his findings respecting the improper handling of this claim by State Farm. His testimony
 13 raises significant factual issues supporting Smyth’s claim of bad faith. Space limitations do not
 14 allow further discussion of his opinions here.
 15

16
 17 **Conclusion**

18 This brief should be read in tandem with Smyth’s cross-motion for summary judgment,
 19 which motion has been filed herewith. For the same reasons that State Farm’s motion for summary
 20 judgment dismissal must be denied, Smyth’s motion for partial summary judgment dismissing State
 21 Farm’s affirmative defenses should be granted.
 22

23 Dated this 3rd day of October, 2005.

24 OSBORN•MACHLER, PLLC

25
 26 By /s/ Simeon J. Osborn

27 Simeon J. Osborn, WSBA #14484

28 Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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